

“Our Religion, established neither by Law nor Parliament”: was the Reformation legislation of 1560 valid?

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In the summer of 1560, England and France sought to bring to a conclusion the military conflict between their forces in Scotland. To that end, deputies or commissioners were appointed by Francis and Mary and by Elizabeth to treat “concerning the renewing our foresaid mutual amity, and to devise such means as may serve to compose and make up the differences that may have brought an alteration therein, according as they shall perceive the same to be for the behoof of our service, the peace and tranquility of our kingdoms, territories and subjects: And in like manner, to give assurance to our subjects of Scotland, that notwithstanding they have of late committed so grievous a crime as to forget their duty towards us”.¹

This grievous crime was a reference to “the rebellion of some of our subjects”.² That rebellion was the uproar for religion by the lords of the congregation against the government of Mary of Guise, who was regent for her daughter, Mary, queen of Scots. Mary had, in 1558, married Francis, the dauphin of France; and on 10 July the couple succeeded to the French throne as Francis II and Mary.

The insurgents acted as if they constituted the government of Scotland. On 21 October 1559, “The Nobility and the Commons of the Protestants of the Church of Scotland” purported to act “in the name and authority of of our Sovereign Lord and Lady” and to suspend the Queen Dowager from the office of regent;³ and on 17 February 1560 they entered into the treaty of Berwick with England, whereby the English promised them aid “to expel

¹ Keith, *History of the Affairs of Church and State in Scotland* (Spottiswoode Society), i, 308.

² Keith, 307.

³ Knox, *John Knox's History of the Reformation in Scotland*, edited by William Croft Dickinson (1949), i, 151-6.

the present power of the Frenche within the realm oppressing the same". The treaty was to be ratified by "the said Ducke and Nobility, being Earlis and Barones in Parliament joined with him".⁴

One of the demands of the lords of the congregation in their campaign against the rule of Mary of Guise was the summoning of a parliament to deal with the question of religion. At that stage, lords of the congregation had no legal existence, they certainly did not constitute a legal parliament. That was a status that they hoped to achieve in the later negotiations between England and France. Elizabeth, who had recently become queen of England, assisted the lords of the congregation first with money, then with the fleet, and finally with troops, as the treaty of Berwick had envisaged. Although the French troops were losing the war, Mary of Guise would not agree to negotiate with the English. But as soon as she died in Edinburgh castle, the negotiations began. And in a short time the commissioners concluded their treaties.

The treaty of Leith, which was signed on 5 July, dealt mainly with military matters, and, with the evacuation of foreign troops and the demolition of fortifications, was soon spent.

The treaty of Edinburgh, which was signed on 6 July, dealt with relations between the two countries. Annexed to the treaty of Edinburgh was a document in which Francis and Mary granted to the nobility and people of Scotland certain concessions which were designed to meet the demands of the lords of the congregation who had been insurgents against the recently deceased regent, Mary of Guise. This was a unilateral grant by Francis and Mary, not a bilateral treaty between two monarchs and their subjects.

There are several documents relating to the treaties of Leith and Edinburgh:

- (1) commission or instructions of Francis and Mary to the French deputies;⁵
- (2) commission of Elizabeth to the English commissioners;⁶

⁴ Keith, i, 261; Thomas Rymer, *Fædera* (London, 1704-17), xv, 569-71.

⁵ Keith, i, 306-9; *Fædera*, xv, 581, 596.

⁶ *Fædera*, xv, 536, not in Keith.

- (3) treaty of Leith;⁷
- (4) treaty of Edinburgh;⁸
- (5) concessions to the nobility and people of Scotland;⁹
- (6) ratification of the treaty of Edinburgh by England.¹⁰

Article IV of the concessions dealt with parliament. "Concerning the petition relating to ... the assembling of the States, the Lords Deputies have agreed, consented and appointed, that ... States of the kingdom may assemble in order to hold a Parliament". "And this Assembly shall be as valid in all respects as if it had been called and appointed by the express commandment of the King and Queen".

On the authority of that provision, the assembly arrogated to itself the status of a meeting of the estates in parliament, with the crown, the mace and the sword laid on the seat or throne usually occupied by the queen.¹¹ On 24 August 1560, this body purported to pass several acts. Of these acts, three purported to sweep away the Catholic church in Scotland. These acts were entitled "Concerning the jurisdiction and autoritie of the bischope of Rome callit the Pape",¹² "Anent the abolitioun of Idolatrie and of all other actis contrair to the confession of fayth publist in this Parliament",¹³ and "Anent the abolitioun of the messe".¹⁴ The meeting also ratified and approved the Confession of Faith.¹⁵

⁷ Keith, i, 289; *Fædera*, xv, 591-3.

⁸ Keith, i, 291-5; *Fædera*, xv, 593-7.

⁹ British Library, Cottonian collection, Caligula, B. IX, number 59, folio 126; Keith, i, 296-306; there is an indifferent translation in Knox, *History*, i, 323-31; *A Source Book of Scottish History*, (1953), i, 171-5 has not included the whole document.

¹⁰ *Fædera*, xv, 601-2, referred to in Keith, i, 295 note 1; *CSPFor.*, iii, 273.

¹¹ Patrick Fraser Tytler, *History of Scotland* (Edinburgh, 1872), iii, 127 and note 1.

¹² 1560 c 2, *APS*, ii, 534, the modern official title is the Papal Jurisdiction Act 1560.

¹³ 1560 c 3, *APS*, ii, 535, the Abolition of Idolatry Act 1560.

¹⁴ 1560 c 4, *APS*, ii, 535, the Abolition of the Mass Act 1560.

¹⁵ 1560 c 1, *APS*, ii, 526, the Confession of Faith Ratification Act 1560.

It is contended in this paper that all three religious acts were invalid in law. (The same invalidity would apply to the other measures passed at the same time.¹⁶) Even if it is assumed that both the treaty of Edinburgh and the concessions to the nobility and people of Scotland and, in particular, those parts of article IV dealing with the parliament were in force, the legislation must yet be regarded as invalid. And the primary reason for that invalidity is that these acts did not have the royal assent. Also, quite separately, assuming that the concessions were valid, there were two other grounds which separately rendered the legislation invalid.

The very summoning of the estates had to have the particular consent of the king and queen, as was separately required by article IV. Article IV stated that the French Deputies who had negotiated the treaty “shall order a despatch to the King and Queen to advertise of this concession [that is, the meeting of the estates], and supplicate them most humbly that they would be pleased to agree what they have herein accorded”; and that supplication was to be made “during the interval of the adjournment”.

The Scots were alive to this provision. At first (8-10 August), the Scots intended to send Dingwall Herald, to France, with the names of the persons that they chose to ask “for the King and Queens consent to this parliament”. But even that procedure was at variance to article IV: that article provided that it was the French commissioners who had negotiated the treaty would be the ones to seek that permission, not persons chosen by parliament.¹⁷ However, the Scots did not even follow through their own plan.

In addition, the intervention of the estates in matters “concerning religion” was expressly excluded by article XVII of the concessions: “Whereas on the part of the Nobles and people of Scotland there have been presented certain Articles concerning religion; and certain other points in which the Lords Deputies would by no means meddle; as being of such importance that they judged them proper to be remitted to the King and Queen.”

¹⁶ Julian Goodare, “The Scottish Parliamentary Records 1560-1603”, *Historical Research*, vol. 72. no. 179 (October 1999), 251.

¹⁷ Article XVII: Keith, 306.

Indeed, absence of royal assent was recognised by the estates themselves, as is apparent from the enacting formula of these acts: the three estates (without mention of the king and queen) has “statute and ordainit”, and “hes annullit and declarit”.¹⁸ And the proceedings were objected to, on this very ground, by the French in their responses to the English ambassador, and in their answer to the embassy of the estates, sent by them to the king and queen of France.

Not unnaturally the French monarchs denounced what the Scots were doing. Francis II stated to the bishop of Limoges, about the resolutions, that they had taken in their parliament, that the Scots “have abolished the mass and introduced so many wicked and beggarly (*malhereuse*) things which [were] undertaken without me, and contrary to the terms (*tenour*) of the treaty”.¹⁹ “Furthermore, that the Estates had deliberated, which they should not have done nor could [they] proceed to the decision without the express authority of the King for all acts of Parliament only have by the confirmation of the King and Queen”.²⁰

On 15 November, Mary had said to the English ambassador, “I will have them assemble by my authority, and proceed in their doings by the law of the realm”.²¹ And also on 16 November, in his letter to the estates, in answer to the embassy of Sandilands to the French court, Francis said, “We have decided to send to you, two good and notable personages, our deputies, to come and have the parliament summoned lawfully”.²²

Further, the invalidity of the acts was also remarked upon, at the time and later, not only by politicians, but also by lawyers of undoubted legal acumen. John Sinclair, bishop of Ross, who was a lord of session and later president of the session (1565-6), and the author of practicks, is reported as saying that the religious settlement was established neither by law, or by parliament.²³

¹⁸ *APS*, ii, 534-5; *CSPScot.*, i, 457-8; Keith, i, 325.

¹⁹ 5 Oct 1560: Teulet, i, 636.

²⁰ Teulet, i, 624-6.

²¹ *CSPFor.*, iii, 394.

²² Teulet, i, 638.

²³ Knox, ii, 81.

In 1566, a commission was set up under the great seal to visit and revise the laws. The commission consisted of nobles, prelates, councillors, lords of session and officers of state. The chief actors in the enterprise were two lords of session, John Lesley, bishop of Ross, and James Balfour of Pittendreich.²⁴ Balfour was later to be clerk register, and then president of the session. The finished work, the *Black Acts*, omitted the acts of 1560. And in his *Practicks*,²⁵ Balfour omits the acts of 1560; and refers to the legislation of 1567 as the foundation of the reformed church.

Later lawyers also regard the acts of 1567, not those of 1560, as the founding charter of the new church. Hope (?1580-1646), in his *Major Practicks*,²⁶ states that “[Out of the printed] actis of parliament in the first parliament of James 6, the act maid in anno 1560 is ratified, viz: - that the pope shall have no jurisdiction nor aucturity within the realm in tyme comeing, and that non of the king’s subjects suit title or right from the pope to any office within the realm, under the paine of barratrie: 1567 c. 2.” And, in his *Minor Practicks*²⁷ he refers to “Parl. 1567, 2nd Act”, but he has no reference to the acts of 1560.

Mackenzie, in his *Institutions*²⁸ states that “Since the Reformation, the King has come in the place of the Pope: K.J.6 parl, Act 2”, that is, the act of 1567. And in his *Observations* he refers to “James VI, parliament I, Acts 3, 4, 5, 6”, and says, “Those Acts Confirm and relate to former Acts past in the Parliament, holden by Queen Mary, August 24 1560, and yet we find no such Parliament²⁹; but the true answer to this is, as appears by Spotswoods History, that the Lords of the Congregation having met in anno 1560, and having past those Acts, abolishing the Popish Religion, many of the Members

²⁴ APS, i, 29 (red).

²⁵ Edited by Peter G. B. McNeill (Stair Society), 32-3.

²⁶ (Stair Society) I.4.41.

²⁷ (ed. Spottiswoode 1734), ii, 5.

²⁸ (2nd ed. 1688, “corrected and enlarged by the author”), I, 5, i.

²⁹ It may be that these records had been lost by 1680s; but the earl of Arran had acquired a copy for his archives, and Knox printed two of the acts in his History (240-1), stating that these were extracted by the clerk register from the book of Parliament.

of that pretended Parliament protested, that this meeting was no Parliament, because there was none there to re-present the Queen, nor the King of France her husband, whereupon Sir James Sandilands was sent over to procure a Ratification of these Acts, which being deny'd, the same Acts are here ratified by the Earl of Murray, when he came to be Regent, as if they had been passed in a lawful Parliament".³⁰

Erskine³¹ is similar: "The Papal jurisdiction was first abolished in Scotland by the act in 1560; which, because it was enacted in a parliament not regularly authorised by the sovereign, was ratified by 1567, c. 2."

After Mary's return from France to Scotland in August 1561, the acts of 1560 were ignored. In the period between 1561 and 1567, there was undoubtedly valid legislation enacted by the estates, or by the council, or by the queen alone by proclamation, which dealt with matters touching the revolutionary situation of 1560-61; but nowhere, in that later legislation, is it suggested that the acts of 1560 were valid, or had been validated.

The proclamation of 1561,³² against making alterations or innovations of the state of religion which her Majesty found publicly and universally standing at her arrival in her Realm, merely referred to the *de facto* situation. It did not even refer to the acts of 1560, which had brought that situation about.

Similarly, the documents setting up of the commissary courts also referred to the *de facto* situation. The commission, which was to advise on the replacement of the catholic consistories, refers to the causes, which the prelates had decided in the consistories which, by long delay of justice, were frustrated. And in the actual commission setting up the new commissaries, the reference is to "the inaction of the jurisdictions of the officials and the commissaries".³³ In neither document is it said that the former jurisdiction of the prelates had been validly taken away by an act of parliament.

³⁰ *Observations on the Acts of Parliament* (Edinburgh, 1686), 172.

³¹ *Institute*, I.v.5.

³² *RPC*, ii, 266-667; Knox, ii, 9-10.

³³ *RPC*, i, 252; Balfour, 670.

The act of oblivion of 1563³⁴ which covers the years 1559 to 1561 also stands alone, without reference to the corresponding act of 1560³⁵ although it did follow the wishes referred to in the representations to the deputies,³⁶ and to the terms of the concessions.³⁷ And the prosecutions against those who favoured the Popish religion were instituted under the valid proclamation of August 1561, and not under the invalid act of 1560.³⁸

In 1560, the reformers (and some later historians) appeared to have assumed that the treaty of Edinburgh, and the concessions became valid as soon as agreement had been reached by the commissioners of Francis and Mary and of Elizabeth. But the weight of the authorities and the contemporary observations indicate that this was not so. It is necessary to consider the questions of full powers and ratification.

Lord McNair summarised the law and practice of full powers and ratification. "We have already seen that, during the past three or more centuries, a profound change has taken place in the role played by the Full Power. A corresponding change in the role of ratification is also to be observed. Formerly, in the days of absolute monarchs, the Full Power itself contained the monarch's promise to ratify whatever might be agreed upon by his plenipotentiary within the limits of his instructions; consequently, the subsequent exchange of instruments of ratification was little more than a formality." "Today, however, a Full Power contains no such promise; and when the treaty (negotiated by the representative) is of such a kind as to require ratification; ratification is essential to bring the treaty into force."³⁹

Bynkershoek, writing in the eighteenth century, said of a signed treaty, "It may be valid as to *form*, but *practically* it has no force without the added authority of ratification".⁴⁰ So, it is sovereign powers who *make*

³⁴ APS, ii, 535-6.

³⁵ Goodare, 252.

³⁶ 25 June 1560: CSPFor., iii, 181.

³⁷ Article VIII: Keith, i, 302.

³⁸ Pitcairn, *Criminal Trials* (Bannatyne Club), i, 416*-418*, 427*-430, 435*, as noted by Donaldson, *Scottish Reformation*, 67.

³⁹ Lord McNair, *Law of Treaties* (1986), 130.

⁴⁰ J. Mervyn Jones, *Full Powers and Ratification* (Cambridge, 1946), 68, quoting Bynkershoek, *Quaestionum Iuris Publici*, (Leiden, 1737) II, chap vii, 232.

treaties which their commissioners *have negotiated*. Bynkershoek also said, "It is the duty of the upright prince to approve, and if he does not, he stands guilty of breach of faith".⁴¹

These elements of treaty making, the full powers and ratification, were present in the treaties of 1560. In 1560, the terms of the instructions to the French commissioners⁴² gave plenipotentiary powers to the commissioners "generally to do all and sundry things which we ourselves would or could do if we were personally present, even although something should fall out which might appear to require a more special instruction than is contained in these presents". And the instructions to the English commissioners were in similar terms.⁴³

The question of ratification was dealt with several times in the documents of 1560. The instructions of the French monarchs to the French deputies stated, "we promise in good faith, and in the word of a King and Queen, to hold agreeable, firm, and stable, all and every thing that shall be agreed, done, and concluded by our foresaid Deputies, or any three or two of them in the absence of the rest; to maintain, keep, observe, approve, and ratify the same, within the time, and after the manner, as they shall agree to; and we shall never act in the contrary thereof any manner of way, for such is our will and pleasure".⁴⁴ The royal instructions to the English commissioners are in similar terms, "Promising ourselves surely and thankfully to be bound, in good faith & royal word, to carry out, in all time coming, all and singular things which will have been acted upon, promised, concluded and agreed by the said commissioners or three of them".⁴⁵

Thereafter, the treaty, as agreed by the commissioners, provided that "it is appointed, agreed and concluded, that this present treaty with all and several conventions and contents thereof, shall be ratified and confirmed by the said Most Mighty and Illustrious Francis and Mary, and Elizabeth, and each of them, within the space of sixty days after the date of the treaty,

⁴¹ J. Mervyn Jones, 68, quoting Bynkershoek, II, chap vii, 234.

⁴² Keith, i, 308.

⁴³ *Fœdera*, xv, 596.

⁴⁴ Keith, i, 308.

⁴⁵ *Fœdera*, xv, 596.

and shall turn them into letters-patents, with their seals appended, and their proper manual subscriptions adjoined; and the said Princes and each of them shall deliver the said confirmatory authentick letters so subscribed and sealed, to the commissioner or commissioners of the other Prince having authority to this effect”.⁴⁶

In the concessions, it was provided “that the saids Most Christian King and Queen Mary shall fulfil all those things which by their saids Commissioners they have granted to saids Nobility of Scotland, at Edinburgh the 6th day of this present year 1560, provided the saids Nobility and people of Scotland shall fulfil and observe all those things that are contained in the saids Articles and Conventions to be performed on their part”; and the emissaries from the estates “shall carry along with them to the King and Queen the confirmation and ratification made by the Estates of the several Articles which are presently granted by the Lords Deputies; at which time they shall get delivered to them the confirmation and ratification done by their Majesties; and even sooner, if the Estates shall transmit their own ratification before that time”.⁴⁷ In addition, (as has been noted earlier), in article IV of the concessions, there were to be a separate supplication by the deputies (not by the nobles) and a separate agreement by the king and queen which were necessary to give the parliament validity.⁴⁸

In summary, the treaties obliged Elizabeth and the two French monarchs to ratify the treaty within 60 days. Quite separately, the deputies “shall order a despatch to the King and Queen to advertise of this concession [that is, the meeting of the estates], and supplicate them most humbly that they would be pleased to agree what they have herein accorded”.

Assuming that Francis and Mary did agree in terms of Art IV that the estates could meet, then the estates of Scotland were bound to ratify the concessions, and send the ratification to the king and queen, who would then ratify and deliver their ratification to the estates, but without any time limits. It seems, as appears from their words and actings, that the parties, were willing to acquiesce in their treaty obligations – at least at first. And

⁴⁶ Article X, Keith, i, 295; *CSPFo.*, iii, 174.

⁴⁷ Article XVII, Keith, i, 306.

⁴⁸ Keith, i, 300.

the French accepted that they could not alter the articles which their commissioners had agreed to, no matter how harsh.

On 9 July the bishop of Valence and de Randan (the French commissioners who had entered into the treaties) wrote to queen mother: "Madame, we have been sent here to negotiate a peace, at a time when we should have begun to prepare ourselves for war, and the enemy was so far advanced in their enterprise, that they had an easy victory on 15 July [*lege* "June"], and were so well informed that we had no plans nor means to prevent them; and so you can understand how difficult and painful it is to conduct negotiations at a distance, and more besides, that our lives were in their hands, and at three hundred leagues from where we should have hoped for counsel and advice on the difficulties which have presented themselves. And seeing ourselves reduced to such an extremity, it was absolutely necessary to make peace, or see the loss before our eyes of 4000 men and of a kingdom, which could never have been recovered without the ruin and desolation of the kingdom of France, we have chosen, between the two evils, the one that which did not carry with it the other evil, nothing but the breaking of our word".⁴⁹

On 28 July, Francis complained about the the harsh and intolerable conditions to which, for the universal peace of Christendom as well as the tranquility of his kingdom [that is, Scotland] and his subjects, he had reconciled himself.⁵⁰ The Venetian Ambassador to France referred to the events of July, and said that the English were in arms and the French were almost completely driven out of Scotland.⁵¹ However, France and England accepted that ratification was necessary to validate the treaty. Elizabeth did ratify the treaty; and she repeatedly called upon the French to ratify as

⁴⁹ Teulet, i, 605; *CSPFo.*, iii, 172n where the item in French in Teulet is translated into English.

⁵⁰ Francis II to bishop of Limoges (Sebastien de l'Aubespine, French ambassador to Spain; there was also M. de l'Aubespine, secretary of state): Teulet, i, 606. There was a similar letter from Robertet, sieur de Fresne, (secretary of state under Francis II and Charles IX), to bishop of Limoges, 28 July 1560: Teulet, i, 608.

⁵¹ Venetian Ambassador to the Doge and Senate, (written a few days before 25 Nov.): *CSPVen.* vii, 273-4.

well. And the English did not demur from the French observation that the treaty was no treaty until it was ratified.⁵²

On the matter of ratification, the Instructions that Sandilands had from the estates, said that they [the estates] have bound themselves to observe the said treaty, and have the same delivered to their majesties to receive their ratification. Yet, it was then well over four months since the treaty had been signed and three and a half months since the reformation parliament had met.

On the one hand, the Scottish meeting did formally ratify their part of the treaty, the concessions, on 8 August,⁵³ but they impliedly repudiated the need for prior ratification by Francis and Mary by their actions in passing the legislation contrary to the terms of the concessions; yet, on the other hand, in a perfunctory way, they sought the agreement of the Francis and Mary to what they had done, but after a delay of three months.

At first, it appeared that the French would in due course ratify the treaty; but later, they began to baulk at the idea of ratification, especially when they saw what had been happening Scotland. The documents show the change in the French attitude.

On 16 August, it was reported that when the English ambassador went to see Charles, the cardinal of Lorraine, then secretary of state, and demanded ratification of the treaty within the agreed time limit, the cardinal said that the French king would not fail to comply with his obligations in due time.⁵⁴ On 2 September Elizabeth ratified the treaty at Windsor,⁵⁵ two days before the required date; and thereafter, the English put pressure on the French to ratify. But between 10 and 15 September, there were a series of meetings between Throckmorton, the English ambassador to France, and the French ministers but, at these meetings, the French temporised. De Randan (one of the French commissioners for the treaty) said that, as for ratification, the king meant to entertain, by all good means, the amity

⁵² Throckmorton (the English ambassador to France) to Elizabeth, 17 Nov 1560, *CSPFo.*, iii, 392.

⁵³ Goodare, 254; *CSPScot.*, i, 456.

⁵⁴ Venetian ambassador in France to Doge and senate: *CSPVen.*, vii, (1558-80) no. 190, 244.

⁵⁵ *Fædera*, xv, 201-2; *CSPFor.*, iii, 273.

between him and the Queen; but the Scots had behaved so badly that the king could not be satisfied or contented with them, for they had not only broken the order for suffering the bishops to enjoy their own, and they had despoiled certain money to the sum of 10,000 crowns, which had been sent into Scotland to pay the King's debts there.⁵⁶

On 15 September, Throckmorton appeared before the French council. He reported that he saw the King in his chamber, with the queen mother, "the French queen", that is, Mary queen of Scots, Francis's two brothers (dukes of Orléans and Angoulême), duke of Guise, cardinals of Lorraine (Charles) and Guise (Louis), the chancellor, the bishops of Orléans and Amiens, MM de Lausac and de la Brosse, knights of the order, three or four of the privy council, de l'Aubespine, Bourdin, d'Allory. secretaries; but neither de Randan nor the bishop of Valence (the two French commissioners for the treaty) was present.

Throckmorton narrated that the councillors were thus assembled, and none was suffered besides them to remain in the chamber. As to ratification of the treaty, the answer by the chancellor; with respect to the ratification of the concessions, was that there was an article that the nobles of Scotland should send to the king and queen by such a day⁵⁷ to desire them to confirm that which had been amongst them accorded, which they had not done; and yet almost three months had past. And the chancellor said that it is also accorded that the Scots should show themselves humble and obedient subjects, which they had not done, but they had committed sundry disorders, contrary to their duty, their promise and the treaty.

The chancellor said that there was also another treaty⁵⁸ made between the deputies of the king and queen and those of queen Elizabeth, wherein it was said that the French king and queen should ratify the the articles agreed upon between the Scots and their deputies [article VIII]; and though the treaties were made one after another, yet seeing that the two nations were

⁵⁶ Throckmorton to Queen, 17 Sept 1560: *CSPFor.*, iii, 298-303; as provided in article III: Keith, i, 300.

⁵⁷ The French chancellor correctly referred to article XVII of the concessions; but he was wrong about the date: no date for ratifications was specified in the concession; although a date was specified in the treaty (article X).

⁵⁸ That is, the treaty of Edinburgh.

joined together in one quarrel and with one mind against the King, they were all one, in effect, and it was not reasonable that the order should be broken.

As to Throckmorton's demand that the treaty of Edinburgh⁵⁹ should be ratified first, the chancellor said that that would not be orderly; because the king and queen would be bound to their subjects, and not they to their sovereigns. If the queen [Elizabeth] wanted to have the treaty ratified, she had to find the means to see that the Scots performed that which they were bound to do by the treaty. Either the king could not ratify the treaty in the state it is; or else the Scotch matters would have to be left forth of the treaty. Otherwise, the king, by ratifying that treaty, would be bound to his subjects, and they would remain at large, to continue their follies and disobedience.

Throckmorton asked for an absolute answer, whether was the king was refusing to ratify the treaty. The chancellor said, yes; unless the queen remedied the matters that he had mentioned. Throckmorton said that ratification of the treaty should not depend on any condition. The treaty of Edinburgh had been made first, so it could have no relation to anything in the concessions, and nothing therein should be an impeachment to the ratification of that made by his queen. There was no reason why the faults of the Scots should impeach the ratification of the treaty made between England and France. M. de l'Aubespine, secretary of state, said to Throckmorton that he would put in writing all that had been said.⁶⁰

Meantime, on 12 September, Sandilands, the emissary of the Scots to Francis and Mary, had left Scotland, on his leisurely way to France.⁶¹ On 18 September, Throckmorton complained bitterly about his treatment, and pleaded with Cecil to send for someone fully instructed to plead against all the objections as were being coined by the Guises.⁶² Also on 18 September, Francis wrote to bishop of Limoges (the French ambassador in Spain), "I

⁵⁹ The document refers to the "letter" which I take to be a misprint for the "latter" that is, the treaty of Edinburgh.

⁶⁰ *CSPFor.*, iii, 298-303.

⁶¹ *CSPFor.*, iii, 283.

⁶² Randolph to Cecil, 7 Sept 1560: *CSPFor.*, iii, 306.

will observe all that I have promised to the Scots, fulfilling that which they have promised also. And because of this, it was necessary before dealing with the said ratification, to hear the said Scots, and know their duty, to which they turn their thoughts.⁶³ By 24 September, according to the French ambassador in England, Elizabeth, believing that the Scots will come to the French king soon, was resigned to wait.⁶⁴ Perhaps, the French felt that if they were to ratify the treaty, they would be homologating what had been happening in Scotland.

The full enormity of the events in Scotland must have alarmed the French. In July 1560, they had made an abject military surrender to the English in Scotland, and they had suffered the indignity of having to allow their troops to be repatriated in English ships, and see their fortifications at Leith and elsewhere being dismantled. Thereafter, a kingdom which had so recently had been virtually a French province, was now *de facto* lost to France and to Catholicism, and the insurgents had almost reduced the realm “to the form of a republic”.⁶⁵ And later, at the beginning of 1561, the French failed to get the Scots to renew the Auld Alliance.⁶⁶

The Venetian ambassador said that “the articles are of such a sort that it would never be credited that the king of France would approve them even had the rope been round his neck, as through their acceptance, not only would he lose all authority in his kingdom of Scotland, but cede it, in a certain way, to the Queen of England, who has undertaken its protection against his Most Christian Majesty”.⁶⁷

The French had found a way out of this pass, by blaming the behaviour of the Scots. On 5 October, Francis stated that because of what the Scots had done by their legislation, “I do not feel myself bound to them or to

⁶³ Le chevalier de Seurre (French ambassador to England) to the king of France: Teulet, i, 628.

⁶⁴ Teulet, i, 635.

⁶⁵ *CSPFor.*, iii, 392, para (5).

⁶⁶ The request had been made by Mary on 12 January 1561: Teulet, i, 640; to Alexandre Labanoff, *Lettres de Marie Stuart* (London, 1844), i, 80, 85; and by Catherine de Medici, the queen mother, on behalf of her son, Charles XI, on 22 January: Teulet, i, 640, 641-4.

⁶⁷ Venetian ambassador to the Doge and Senate, 25 November, *CSPVen.*, vii, 273.

fulfil anything to them on my part”.⁶⁸ As part of the delaying tactics, the French promised to send gentlemen to Elizabeth to explain the situation. That was in mid-September – a month before the mission of Sandilands had arrived in France.

The process of ratification of the concessions by the king and queen could not start to be activated until Sandilands had presented the ratification document of the Scottish estates (dated 17 August⁶⁹) to the king and queen, and had received the royal ratification in turn, as provided in article XVII. Finally, on 14 November, Sandilands and “the cardinal” did meet; but there was to be no ratification by Francis and Mary. This failure to ratify the concessions was crucial for the validity of the Scottish assembly, and for the validity of its acts.

On 15 November, Throckmorton saw the cardinal, who said that Throckmorton should be patient. He would hear the king’s pleasure anon. Throckmorton said that his mistress would find this strange handling from a prince bearing her amity; but the cardinal said “no ratification, no treaty”. Throckmorton reported back to Elizabeth that the French were using the English arms at the gate of every town in France.⁷⁰ And Elizabeth was very anxious to have the treaty ratified so that the French would give up using the English arms. There is an element of hypocrisy here: although Elizabeth complained persistently about the French adopting the English arms, in her instructions to the commissioners for the treaty, Elizabeth styled herself as “Queen of England, *France* and Ireland”.⁷¹ And Britain did not give up the title until the treaty of Amiens in 1801-2.

On 16 November, Throckmorton saw the king. He answered that, as his subjects in Scotland had in no point observed their duty to him, he could not ratify the treaty, but would send two gentlemen to the queen about this. He also said that he was sure his uncle, the cardinal, had answered Throckmorton in all points. And Throckmorton was dismissed.

⁶⁸ Teulet, i, 636.

⁶⁹ *CSPScot.*, i, 463; also *CSPFor.*, iii, 236; Teulet, 613 + *CSPFor.*, iii, 235 (no. 428).

⁷⁰ 17 November 1560, *CSPFor.*, iii, 392.

⁷¹ *Fœdera*, xv, 536.

Throckmorton also reported that, on 16 November, the French queen [that is, Mary] had come into the room where he was. Throckmorton told Mary he was commanded by Elizabeth to demand ratification of the treaty. Mary answered that the reply of the king and council, which had been given on 15 September, should have sufficed, but that now she would tell him what moved her to refuse it.

My subjects in Scotland do their duty in nothing, nor have they performed their part in one thing that belongeth to them. I am their Queen, and so they call me, but they use me not so, they have done what pleaseth them, and though I have not many faithful there, yet these few that be there on my party were not present when these matters were done, not at the assembly. I will have them assemble by my authority, and proceed in their doings by the law of the realm, which they so much boast of, and keep none of them. They have sent hither a poor gentleman to me, who I disdain to have come in the name of them all, to the king and me, in such a legation. They have sent great personages to your mistress. I am their Sovereign, but they take me not so; they must be taught to know their duties.

Throckmorton reported that this speech was uttered in some choler and anger against the Scots. Mary also added that her uncles had already satisfied Throckmorton about the bearing of English arms.⁷²

Also on 16 November Francis wrote to the estates, expressing his great displeasure.⁷³ He hoped that the Scots would return to the good road from which they had deviated. Then there came a complete rebuff to the estates for holding their purported parliament: "We have decided to send to you, two good and notable personages, our deputies, to come and have the parliament summoned lawfully". And he sent his reply to the estates with Sandilands, who left on 26 November.⁷⁴ On 25 November, the duke of Guise said, in the name of his Most Christian Majesty, that, for the present,

⁷² Throckmorton to queen, *CSPFor.*, iii, 392-4.

⁷³ Teulet, i 638; *CSPFor.*, iii, 390: cf. *CSPScot.*, i, 492.

⁷⁴ Teulet, i, 639; *CSPScot.*, i, 410.

he would not ratify the articles of peace, and that he would send a person to Queen Elizabeth to give an account of the causes which induced him to suspend consent.⁷⁵ The Venetian ambassador regarded this procrastination by the French, as a wise policy, for Queen Elizabeth had already disarmed, and the King of France was still at liberty to sign or not to sign.⁷⁶

That view correctly represented the situation in November and December. The balance of power between England and France had undoubtedly altered. The overwhelming military advantage which Elizabeth had had over the French forces in Scotland in July 1560 had long since evaporated. This seemed a very serious matter to the English ambassador, as it appeared to him that his queen had been deceived, for when she had an army in the field, ratification had been promised her at the appointed time, but when she had disarmed entirely, it was delayed under various pretences, which were no longer valid.⁷⁷

Then fate took a hand in events. On 25 November, Francis II is noted as being weak and feeble;⁷⁸ and on 5 December, the king died.⁷⁹ As a result, a new situation had arisen: Mary became a powerless widow; and the political dominance of the Guise family in France was superseded by the power of Catherine de Medici, the queen mother. Before and after the death of Francis, Throckmorton continued to press the French for ratification. But the queen mother said that since Francis II was dead, it was for Mary to answer for the matters of Scotland; and the English were coming round to that view.⁸⁰

In the summer of 1561, Mary left France for Scotland. Since both the French and Mary declined to ratify the treaty, there was little that Elizabeth could do. There was no international court to which Elizabeth could appeal. In 1819, when Spain refused to ratify a treaty with the young United States of America, John Quincy Adams, the secretary of state, said that "As there

⁷⁵ *CSPVen.*, vii, 273.

⁷⁶ *CSPVen.*, vii, 273.

⁷⁷ *CSPVen.*, vii, 273.

⁷⁸ *CSPVen.*, vii, 273.

⁷⁹ Dunbar, 253.

⁸⁰ *CSPFor.*, iii, 467-8, 507.

is no court of chancery between nations, their differences can be settled only by agreement, or force".⁸¹

Elizabeth had appealed to the supposed amity between England and France; but that had failed. She might have considered renewing the hostilities with France, but that was not practical politics. In the summer of 1560, she had had a visible and vulnerable enemy in Scotland; but now, if she were minded to renew the hostilities, she would have to raise a new army, and invade France. As for the unratified treaty, after the death of Francis, the main matter of any significance was the relationship between Mary and Elizabeth. Later, Lethington tried and failed to convert the obligation to ratify the treaty into an order of succession to the English throne.⁸² But that is another matter. Right reason or none, there was no ratification of the treaty, or of the concessions; and accordingly the Scottish assembly and its acts were a legal nothing.

By and large, what the French had said about the behaviour of the Scots was correct. The treaty had clearly provided "That the saids Most Christian King and Queen Mary shall fulfil all those things which by their saids Commissioners they have granted to saids Nobility of Scotland, at Edinburgh the 6th day of this present year 1560, provided the saids Nobility and people of Scotland shall fulfil and observe all those things that are contained in the saids Articles and Conventions to be performed on their part".⁸³ And on any reasonable view of the facts the Scots had clearly failed to fulfil and observe the principal provisions of the concessions.

It is a nice point whether the treaty of Edinburgh and the concessions should be regarded as severable (as Throckmorton had argued before the French council), so that the French should be bound to ratify the treaty, and be not bound to ratify the concessions. If the view of Throckmorton, that the treaties were severable, was sound, the promises in good faith and the word of a king and queen which Francis and Mary made to their commissioners counted for nothing. But it does not matter very much whether

⁸¹ John Basset Moore, *A Digest of International Law* (Washington, 1906), v, 190.

⁸² Black, *Elizabeth* (Oxford, 1936), 61-3; letter from Mary queen of Scots to duke of Guise, January 1562 in *SHS Miscellany II* (1906), XLIII, Appendix, I.

⁸³ Article VIII. Keith, i, 294.

the failure to ratify was justified or not. The significant thing was the effect of non ratification of the concessions on the meeting of the estates in 1560, and the legislation that they purported to pass.

Since there was no ratification of the treaty (in terms of article X of the treaty and article XVII of the concessions), there was no valid treaty, and no valid concessions, (including article IV which dealt with the special permission for assembling of the parliament). Since there were no valid concessions, there could not be a valid parliament. And since there was no valid parliament, there could be no valid legislation. And that invalidity applied not just to the three measures dealing with religion, but to all of the purported acts of that assembly.⁸⁴

The invalidity of the treaty would in itself constitute compelling authority for holding that the legislation was invalid, and that in addition to the invalidity by reason of absence of the royal assent to the legislation. Oddly enough, even if the treaty had been ratified, and thus had been properly brought into force, the French would not have given very much away in the concessions. True, the separate military convention represented a huge military surrender of the French forces in Scotland. But that merely reflected the fact that the French had been defeated on the battlefield. In comparison, the matters granted in the concessions were almost trivial, and most of the concessions were hedged by a series of vetoes which were open to the king and queen.

Even if the deputies did “order a despatch to the King and Queen to advertise of this concession [that is, the meeting of the parliament], and supplicate them most humbly that they would be pleased to agree what they have herein accorded”, Francis and Mary could have refused to agree with what the deputies had agreed in article IV of the treaty dealing with the meeting of a parliament. And even if they had allowed the estates to assemble in order to hold a parliament, Francis and Mary could forbid the parliament from discussing “certain Articles concerning religion, and certain other points in which the Lords Deputies would by no means meddle”. However, no matter what the strict legal position was, the *de facto* situation was far different.

⁸⁴ Goodare, 258-54.

In the absence of a resident viceroy, such as Mary of Guise, and in the absence of pro French military and political power, the distant king and queen could not prevent the Scots from seizing revolutionary power, and passing such legislation as they wanted, under the spurious authority of the unratified treaty. And in the year between the meeting of the estates and the return of Mary to Scotland, the Scots had continued to consolidate their revolution. The reformation had gone so far that, in a matter of days after Mary's arrival, that revolution was able to extract from the queen a sort of stop-gap legal validity, with the proclamation of 1561, which confirmed the status quo in relation to religion.

Between 1561 and 1567, in the remaining years of Mary's reign, the status of the reformed church was enhanced bit by bit. Then, on December 1567, after the abdication of Mary, and the accession of her son, James, a genuine parliament re-enacted the three acts of 1560 as well as the act approving the confession of faith, and all in identical form.⁸⁵

It is clear that this new legislation of 1567 applied prospectively; but there is a question whether that legislation applied retrospectively as well, so as to validate the acts of 1560, as from 1560. In private law, with a charter of novodamus, in certain situations, such as for example, where the original titles had been destroyed, or were lost the re-grant is taken to be retrospective; but in these cases the new charter of novodamus would be in the same terms as the lost charter. The description of the lands and the reservations and conditions would be as in the original grant. But, in the legislation of 1567, the use of the words "of new" and "in tymes cuming" suggest that the legislation of 1567 was not retrospective. This is in marked contrast to another later ratifying act which was passed in 1581.⁸⁶

The act of 1581 went much further in the direction of ratification, than the legislation of 1567 had done. The act 1581 c 20⁸⁷ re-enacted two of the acts of 1560 (which dealt with transfer of cases from Rome to the temporal courts in Scotland): but that ratification was expressly stated to be retrospective. The words of the 1581 act are unequivocal: it ratified,

⁸⁵ *APS*, iii, 14-22.

⁸⁶ Goodare, 251.

⁸⁷ *APS*, iii, 221-2.

approved and confirmed the act of 1560 in all points, parts, clauses, and articles contained therein, and ordained the same to have full strength, force and effect, and also decerned and declared the same act to have been a common law “from the day and date thereof”, and so to be all times coming.

Yet, the invalid acts of 1560 constituted the *de facto* basis of the reformation, on which the uneven developments of the reformed church over the next century were to be built.

If the Scots of August 1560 had been humble and obedient subjects (as Francis and Mary expected them to be), and if they had waited for the ratification of the treaty and the concessions by Francis and Mary, and if they had waited until the French delegates had asked Francis and Mary for the permission to hold a parliament, and if they had waited for Francis and Mary to let the estates discuss religion, it seems likely that none of these permissions would ever have been given willingly.

Indeed, if the Scots of August 1560 had been humble and obedient subjects, who can say how the reformation in Scotland would have developed, if at all?

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